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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY,
Appellant,

-v.-

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL, FRIENDS OF THE EARTH, CONSUMER ACTION NOW, SUSAN MAINWARING AND JOAN McCALL, AS PETITIONERS IN No. 79-595, AND ON BEHALF OF THE CONSUMER FEDERATION OF AMERICA, THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE UNION OF CONCERNED SCIENTISTS, BROOKLYN ANTI-NUCLEAR GROUP AND THE ENVIRONMENTAL ACTION FOUNDATION

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Interest of Amici

Natural Resources Defense Council ("NRDC"),[1] Friends of the Earth ("FOE"),[2] Consumer Action Now ("CAN"),[3] and Susan Mainwaring and Joan McCall[4] are organizations and individuals who, as discussed below, instituted and fully participated in the New York Public Service Commission (hereinafter "the PSC") Rulemaking which resulted in the ban on controversial

[1]Natural Resources Defense Council is a non-profit corporation which is dedicated to the defense and preservation of the human environment and natural resources of this country. NRDC has employed independent technical research and intensive educational campaigns to challenge many assumptions about atomic energy and to reveal some of its serious drawbacks. Many of NRDC's more than 24,000 members have joined the organization to obtain adequate representation and protection for their interests in insuring against unsafe and environmentally hazardous uses of atomic energy. Like FOE and CAN, a number of NRDC's members are customers of Consolidated Edison and Central Hudson, as well as other New York utilities, and have received pro-nuclear bill inserts which they find offensive and with which they strongly disagree.

[2]Friends of the Earth is a non-profit, national organization with a New York chapter numbering approximately 2,200 members. Since its inception in 1969, FOE has been concerned with adverse environmental effects of nuclear energy, and has been engaged in the dissemination of information on nuclear power issues.

[3]Consumer Action Now is a non-profit organization with a constituency of approximately 20,000 persons, which operates primarily as a consumer education and information center. CAN is dedicated to insuring that the general public, as well as its constituents, are fully and fairly informed about a large number of consumer issues, including energy development and safety.

[4]Susan Mainwaring and Joan McCall are individual ratepayors who are customers of Con Ed, and who participated in the New York Public Service Commission Rulemaking which led to the ban challenged in this case.

bill inserts challenged here by Consolidated Edison ("Con Ed").[5]

The Consumer Federation of America ("CFA"),[6] Office of Communication of the United Church of Christ,[7]

[5]All these Amici have been represented in all relevant preliminary proceedings — from the PSC Rulemaking through argument in the United States Court of Appeals — and here, by staff and/or cooperating attorneys with the Media Access Project, a not-for-profit, public-interest law firm specializing in communications law and the dissemination of opposing viewpoints on controversial issues.

[6]Consumer Federation of America is a federation of more than 220 state, local and national organizations, representing more than 30 million consumers, which advocates the consumer viewpoint before government bodies, including Congress and federal agencies. The consumer groups represented by the CFA include, *inter alia*, women, the elderly, blacks, chicanos, and members of other traditionally un- or under-represented interests. CFA member organizations include: The National Council of Senior Citizens; The American Association of Retired Persons-National Retired Teachers Association; National Council of Jewish Women; B'nai B'rith Women; National Ladies Auxiliary, Jewish War Veterans of America; National Board of YWCA; the United Auto Workers; United Steelworkers of America; International Ladies Garment Workers Union; Amalgamated Clothing Workers; Communications Workers of America; and International Union of Electrical, Radio & Machine Workers. In addition, numerous CFA member organizations represent broad-based consumer economic interests and include: Cooperative League of USA; Credit Union National Association; Arizona Consumer Council; Association of Massachusetts Consumers; Cleveland Consumers Action Movement; Consumer Association of West Virginia; D.C. Consumer Affairs Committee of the Americans for Democratic Action; and New York Consumer Council.

[7]The Office of Communication of the United Church of Christ is a national instrumentality of the United Church of Christ, a Protestant denomination with more than two million members in some 7,200 congregations. The Office of Communication is charged by the United Church of Christ constitution to conduct a ministry in mass communications. It has participated in numerous federal and state proceedings, including broadcast and telecommunications common-carrier matters, to enhance the free flow of information and contrasting points of view on issues of public importance.

Union of Concerned Scientists ("UCS"),[8] Brooklyn Anti-Nuclear Group ("BANG"), and the Environmental Action Foundation ("EFA")[9] are groups who are deeply concerned about, and intimately involved in the kinds of consumer, environmental and communications issues raised by the instant appeal.

As more fully set forth in the Statement of the Case which follows, NRDC, *et al.* have been critically important and full participants in every portion of the case before this Court except that, through no fault of their own, they were not parties in the State Court action here reviewed.[10] They, and the additional Amici, represent

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[8]The Union of Concerned Scientists is a non-profit organization based in Cambridge, Massachusetts which is concerned principally with the impact of advanced technology on society. UCS was organized in 1969 as an informal faculty group at The Massachusetts Institute of Technology and has grown into a nationwide organization supported financially by 90,000 concerned citizens. UCS's interest in this case arises from the independent technical studies which it has conducted on nuclear power plant safety, radioactive waste disposal, energy policy alternative, and arms control measures, and dissemination of information on those issues to the public-at-large.

[9]The Brooklyn Anti-Nuclear Group is a community group located in Brooklyn, New York, an area whose electric power is supplied by Con Ed. BANG's objective is the prompt cessation of all nuclear power plants presently in operation and the prompt halt to construction of all new nuclear power plants.

The Environmental Action Foundation is a Washington, D.C.-based citizen information and action organization formed to aid in protection of the world's environment. It has been concerned with matters relating to utility regulation for seven years, and has a Utility Project to effectuate that goal. EAF distributes newsletters, resource materials and other publications throughout the nation, many of which address arguments surrounding the regulation of electric utilities and its effect on consumers and the environment.

[10]They were full party defendants in an identical federal court action, and participated as fully as permitted by law as amici in the state court.

the independent interests of ratepayors and consumers, interests which the PSC has considered and "balanced" in enacting its *Policy Statement*, but interests which it cannot be said to truly represent.[11]

Further, Amici assert independent First Amendment interests which have been recognized by this Court,[12] and which must be balanced against the interests asserted by Con Ed and other utilities.

Finally, NRDC, FOE and CAN were parties to the federal court action challenging the same PSC *Policy Statement*. In that case, they engaged in extensive discovery, resulting in a factual record[13] which will hopefully illumine the otherwise abstract issues presented to this Court in this case.

Statement of the Case

In 1976, acting on complaints from NRDC against Con Ed, the PSC instituted a rulemaking proceeding on the issues of political and other utility advertising, and the use of utility bill inserts for the dissemination of the utility's views on controversial matters of public policy. After many months, and the consideration of hundreds of comments, on February 25, 1977 the PSC issued its *Policy Statement*, followed, on July 14, 1977,

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[11]See *Office of Communications of United Church of Christ v. F.C.C.*, 359 F.2d 990, 1002 (D.C. Cir. 1966).

[12]These are the right to be free from forced subsidy of political ideas with which they disagree, and the right to be free from having objectionable material unavoidably thrust upon them in the privacy of their homes.

[13]LILCO has already lodged a copy of the joint appendix which was filed in the Second Circuit with the Clerk of this Court. Factual assertions contained in this brief are drawn from that brief and will be denominated by the appropriate page number preceded by the letters "JA".

by an Order Denying Petitions for Rehearing ("The *Reconsideration*").[14]

NRDC, FOE and CAN's initial interest in the PSC rulemaking was to obtain "equal time" or shared access to utility bill inserts which had been and were being employed to disseminate pro-nuclear propaganda. However, in adopting the *Policy Statement* here challenged, the Commission declined to adopt the shared access scheme proposed by those Amici.[15] Instead, it banned the use of bill inserts for dissemination of utility company views on all "controversial matters of public policy." Since that decision, NRDC, *et al.* have supported the PSC ban as the "least restrictive means" it could employ, but have continued to argue that if the ban is set aside some shared access scheme is constitutionally compelled.

Following the Commission's *Policy Statement* and *Reconsideration*, the Long Island Lighting Company ("LILCO")[16] commenced an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of New York[17] challenging the ban on contro-

[14]See 31a, *et seq.* (*Policy Statement*) and 59a, *et seq.* (*Reconsideration*). References to the Appendix to the Jurisdictional Statement filed in this case by Con Ed will be denominated by the appropriate page number followed by a lower case "a".

[15]See, *e.g.*, *Reconsideration* at 66a-67a, and separate opinion of Chairman Kahn, at 55a. Commentators have cited the *Rulemaking* here at issue as one in which the shared access concept was considered and rejected. See Note, *Utility Companies & the First Amendment: Regulating the Use of Political Inserts in Utility Bills*, 64 Va. L. Rev. 921, 931 n. 52 (1978) (hereinafter *"Utility Companies & the First Amendment"*).

[16]LILCO filed a petition for certiorari which has been docketed in this Court as 79-629. It has already filed an amicus brief in the instant appeal in support of the position taken by Con Ed.

[17]*Long Island Lighting Company v. New York Public Service Commission*, 77 Civ. 972 (hereinafter "the LILCO case", or "the federal action"). The opinion in that case is printed as an appendix to LILCO's amicus curiae brief.

versial bill inserts as a violation of its First Amendment rights. LILCO also challenged the Commission's ban on advertising electric space heating.[18] NRDC, FOE, CAN, and the individual ratepayors[19] moved to intervene as party-defendants on the bill insert issue. Their motion was granted, and they participated fully in that case, including engaging in extensive discovery which resulted in a full record on factual matters critical to the determination of the First Amendment questions there- and here-presented.[20]

While the *LILCO* case was *sub judice* in the District Court, Con Ed and Central Hudson commenced a state court action challenging the same PSC *Policy Statement*. However, because New York law does not require that participants on PSC rulemakings be notified when the results of those rulemakings are challenged, NRDC, *et al.* were unaware of the state court action until after the time for intervention had passed. Because, through no fault of their own, there was no way to be involved as parties, NRDC, *et al.* participated as amici throughout the state action.

The New York Court of Appeals and the District Court decided their respective, but virtually identical,

[18]NRDC, *et al.* participated only on the bill insert issue, and assert their interest as amici in this case solely on that issue.

[19]One other party, Scientists Institute for Public Information ("SIPI") was an intervenor in the federal court action, but it has been removed as a participant in this action by the consent of all parties. Accordingly, when referring to those groups and individuals who participated in the *Rulemaking* and federal court action, the general term "NRDC, *et al.*" will be employed.

[20]These included the costs to the utility and the ratepayors of the use of bill inserts; the cost and relative efficacy of other means of communicating the utility's views; the utility's need to employ bill inserts based on the history of its use of that means of disseminating its views, etc. The facts found are summarized in the Rule 9(g) statement filed in the District Court by Intervenors, and reproduced in the Joint Appendix at JA 343, *et seq.*

cases within a month of each other.[21] The appellant utilities in the state case appealed directly to this Court[22] while LILCO and the PSC each cross-appealed the District Court's decision to the United States Court of Appeals for the Second Circuit.[23]

After probable jurisdiction was granted in the instant case, and before oral argument was had in the Second Circuit, on October 11, NRDC, *et al.* petitioned this Court for certiorari prior to judgment, and for expedited consideration of the certiorari petition.[24] The *LILCO* case was argued in the Circuit on October 22 and is presently *sub judice*. On October 29 this Court denied NRDC and LILCO's motions for expedited consideration; the petitions for certiorari are still pending.

Questions Presented

1. May the New York Public Service Commission, statutorily mandated to regulate state-franchised utilities to serve the public interest, constitutionally ban the use of the utility billing mechanism for the utility company's views on controversial matters of public policy when, in its expert opinion:

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[21]The District Court decision in *LILCO*, rendered on March 30, 1979, upheld the ban on controversial bill inserts, but struck down the ban on advertising electric space heating. The New York Court of Appeals decided *Con Ed* and *Central Hudson* on May 1, 1979, upholding both of the Commission's bans.

[22]Probable jurisdiction was noted in *Con Ed* on October 1, 1979, and the case was docketed as 79-134. Probable jurisdiction was noted in *Central Hudson* on November 27, 1979 and that case was docketed as 79-565.

[23]The appeals are docketed in the Second Circuit as 79-7374 and 79-7375.

[24]LILCO filed a similar petition and motion on October 12, and the PSC wrote to this Court that it had no opposition to the granting of both petitions. The NRDC petition was docketed as 79-595, and LILCO's petition as 79-629.

(a) such a ban is constitutionally required to prevent unwilling ratepayors from subsidizing political views with which they disagree, and/or

(b) such ban is constitutionally required to protect ratepayors from having offensive material unavoidably thrust upon them in the privacy of their home, and/or

(c) such ban is required to meet the non-discrimination requirements of the state public service law which prohibits favoring one class of ratepayors (*i.e.*, those sharing the utility company's views) over another, and/or

(d) such ban is required to conserve the bill insert mechanism for useful consumer billing and rate information as required by statute, and/or

(e) such ban is required to prevent the billing insert from becoming a public forum, necessitating the Commission's constant intrusive presence in administering a constitutionally required shared access scheme

and, where the ban in no way diminishes the utility's ability to communicate its views on any controversial issue by any means or channel open to any other person, including the United States mails?

2. May the Commission's ban on the use of the billing insert mechanism be upheld as a reasonable time place or manner restriction where:

(a) numerous alternate means for communicating the utility's views remained open, and

(b) numerous substantial governmental *and* countervailing First Amendment interests are served by the ban, and

(c) the speech regulated by the ban was broadly defined by class, viewpoint neutral, and did not even conceivably place the Commission or the State on one side of an issue?

3. Was the ban unconstitutionally vague where the term was familiar, concededly synonymous with the term "political" as used in settled agency practice, and where the agency agreed to give expeditious prior rulings where utilities expressed any doubt as to its applicability?

4. If the Commission's ban is struck down, must the case be remanded to the Commission with instructions to formulate and administer a shared access scheme as required by the First Amendment and as previously proposed to the Commission by Amici below?

ARGUMENT

Summary of Argument

A) The Conceptual Framework

This case does not fall neatly into any of the traditional categories of First Amendment analysis which provide a standard test and a readily discernible result.[25]

[25]There is, of course, some question as to whether there is *any* traditional First Amendment theory presently shared by a majority of the Supreme Court or by leading constitutional scholars. Besides the now familiar, but still complex, debate between the so-called "absolutists" and the "balancers", compare, *e.g.*, Kalven, *Upon Rereading Justice Black on the First Amendment*, 14 UCLA L. Rev. 428 (1967) *with* Gunther, *In Search of Judicial Quality on a Changing Court; The Case of Justice Powell*, 24 Stan. L. Rev. 1001 (1972), *and* Alfrange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 Sup. Ct. Rev. 1 *with* Ely, *Flag, Desecration, A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975); *and see generally* the Mendelson-Franz debate in articles cited in Tribe, *American Constitutional Law*, 582-83 n. 19 (1978) (hereinafter "Tribe"). Professor Tribe has himself entered the fray with his own "two-track" theory of analysis, which divides government actions (and thus the extent of permissible regulation) between those aimed at communicative impact (Track 1) and those aimed at non-communicative impact but nevertheless having adverse effects on communicative opportunity (Track 2). Tribe, *supra*, at p. 580 *et seq.*

Con Ed's brief and LILCO's Amicus Curiae Brief reflect the lack of any familiar conceptual analysis, and indeed impose no real conceptual framework. The New York Court of Appeals opinion, although it employed some traditional concepts,[26] did so in an unfamiliar context.[27]

First Amendment cases, and particularly those decided by this Court, have employed numerous distinctions in reaching their constitutionally compelled conclusions — these have included, to name but a few, public vs. private,[28] commercial vs. non-commercial,[29] press vs. electronic media,[30] symbolic speech vs. "pure" speech,[31] etc. Depending on the categories employed, or the distinctions deemed dispositive,[32] diverse "tests"

[26]We refer here to the use of the "time place or manner" test which is discussed more fully *infra* at Point III.

[27]Bill inserts, clearly do not resemble the parks and streets which have traditionally been seen as public forums, and which have given rise to the "time place or manner" analysis. Point III (A) *infra*. See generally, Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1; Dorsen, Bender and Neuborne, *Political and Civil Rights in the United States*, Vol. I, pp. 442 *et seq.* (4th ed.).

[28]See, for example, the contradictory positions taken in the shopping center cases, *e.g.*, *Amalgamated Food Employees v. Logan Valley Plaza*, 391 US 308 (1968); *Lloyd Corp. v. Tanner*, 407 US 551 (1972); and *Hudgens v. NLRB*, 424 US 507 (1976) which overruled *Logan Valley*. Note also the substantial First Amendment implications of classifying a potential defamation plaintiff as a "public" or "private" figure. Compare *Gertz v. Robert Welch, Inc.*, 418 US 323 (1974) with *Time, Inc. v. Firestone*, 424 US 448 (1976).

[29]The shift in the Court's position and the numerous shades of difference its recent decisions have involved are fully discussed in Roberts, *Toward a General Theory of Commercial Speech & the First Amendment*, 40 Ohio St. L. Rev. 115 (1979) (hereinafter "Roberts").

[30]Compare, *e.g.*, *Miami Herald Publishing Company v. Tornillo*, 418 US 241 (1974) with *Red Lion Broadcasting Co. v. FCC*, 395 US 367 (1969).

[31]Compare the nuances of analysis engendered by these characterizations in *United States v. O'Brien*, 391 US 367 (1968) with *Tinker v. Des Moines School District*, 393 US 503 (1969).

[32]These distinctions may and do vary from case to case.

are employed to reach a result. These may range from requiring a "compelling state interest" for the abridgement of pure speech,[33] to "reasonable time place or manner restrictions" on speech in public forums,[34] or to the so-called *O'Brien* test[35] for regulating "symbolic" speech.

To a greater or lesser degree, all of these cases, however structured, require an inquiry into several critical issues. These are:

1) What purposes or goals of the First Amendment[36] are implicated or lessened by the challenged state action?

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[33]Speech which is "entirely divorced from actually or potentially disruptive conduct...[is] akin to pure speech." *Tinker v. Des Moines School District, supra* at p. 505.

[34]The State may reglate the time, place and manner of speech so long as such regulations are justified without reference to the content of the regulated speech, serve a significant governmental interest, and leave open ample alternative channels for communication of the information. *E.g., Grayned v. City of Rockford*, 408 US 104, 115-117 (1972); *Martin v. Struthers*, 319 US 141 (1943).

[35]The test in *United States v. O'Brien, supra,* applies to speech which contains elements of both speech and non-speech. It is as follows:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 US at 377.

[36]Three major purposes of the First Amendment's guarantee of freedom of speech have been identified. These are:

1) furtherance of an open "marketplace of ideas," -- see, *e.g., Abrams v. United States*, 250 US 616, 630 (1919) (Holmes and Brandeis dissenting); J. Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644);

2) furtherance of intelligent, self government in a democratic system, see, *e.g.*, Meiklejohn, *Political Freedom* (1960);

(Footnote continued on next page)

2) If the state action is a restriction or regulation, does such restriction or regulation actually "abridge" speech,[37] and if so, how much?[38]
3) Does the state have substantial, important, or compelling reasons for its action?[39]
4) If so, has it acted as narrowly, or least restrictively as possible?[40]

Another complimentary kind of inquiry is that suggested by Tribe's[41] two-track analysis. One first must ask whether the State's action is aimed at "communi-

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T. Emerson, *The System of Freedom of Expression*, 7 (1970);
A. Bickel, *The Morality of Consent*, 62-63 (1975); and
3) furtherance of the individual's ability of self-expression and thought, see, *e.g., Whitney v. California*, 274 US 357, 375 (1927) (Brandeis and Holmes, J.J., concurring).

[37]As the District of Columbia Circuit has recently noted, "...rules restricting speech do not necessarily abridge freedom of speech." *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. den.* 434 US 829 (1977). While it wrote in the context of regulation of broadcast media "to prevent cacophony," the concept is readily transferable to other First Amendment arenas.

[38]This question may also necessarily include an inquiry into the availability of alternate means of communication.

[39]The extent of the State's interest required will, obviously, vary depending upon the degree of interference with the interests protected by the First Amendment; hence, if not a sliding scale, certainly a continuum of qualifications is required.

[40]This question or test is generally phrased in terms of whether the State has used the least restrictive means necessary to accomplish its legitimate purpose, or whether the law or regulation challenged is so narrowly drawn as to take in only the evil sought to be prevented and no more, *e.g., Hynes v. Mayor of Oradell*, 425 US 610, 619 (1976).

[41]Tribe, *American Constitutional Law, supra* at pp. 580-584.

cative"[42] or "non-communicative"[43] impact. If the state means to limit or otherwise effect the communicative impact of speech, it has placed itself on one side of an issue; this is almost always impermissible. If the state's action is aimed at the non-communicative effect of speech, or speech-related conduct, the courts will employ a weighing or balancing of competing interests since

> "...regulatory choices aimed at harms not caused by ideas or information as such are acceptable so long as they do not *unduly* constrict the flow of information and ideas" Tribe, *supra* at pp. 581-82 quoting from *Cox v. New Hampshire*, 312 US 569, 574 (1941).

Almost 30 years ago, in an explication of the process by which this Court must ultimately determine First Amendment issues in individual cases, Justice Frankfurter accurately reflected, and more accurately prophesied,

> "The results in these multifarious cases have been expressed in language looking in two directions. While the Court has emphasized the importance of "free speech," it has recognized that "free speech" is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if interference with free expression of ideas is not found to be the overbalancing consideration. More important

[42]By this, Tribe means restriction, regulation or prohibition of speech *because of* the ideas it expresses; see, *e.g.*, the discussion of sedition laws in *NY Times v. Sullivan*, 376 US 254, 276 (1964), or because of the *consequences* which may flow from its receipt, see, *e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 US 748 (1976).

[43]Here he means that "without aiming at ideas or information in either of the above senses, government can constrict the flow of information and ideas while pursuing other goals, either (a) by limiting an activity through which information and ideas might be conveyed, or (b) by enforcing rules compliance with which might discourage the communication of ideas or information." Tribe, *supra* at p. 580. This analysis would support the state interests in protecting privacy and avoiding forced subsidy discussed at Points I (B) and (A) *infra*.

> than the phrasing of the opinions are the questions on which the decisions appear to have turned." *Niemotko v. Maryland*, 340 US 268, 282 (1951).

B) Summary of Amici's Arguments

Whatever "balancing" or "accommodation of interests" the First Amendment requires in this case can only be achieved by asking the relevant questions[44] and by then answering them from facts in the record below.[45] To aid the Court in this inquiry, Amici will first address themselves to the general questions

1) What legitimate state interests did the Commission seek to further by its ban on bill inserts of "controversial issues of policy?" and
2) What is the actual effect of the ban on a utility's ability to speak on these issues, and on the public debate which encompasses them?[46]

In answering these questions, Amici will suggest the legal conclusions which inevitably flow from those

[44]See *Young v. American Mini-Theatres*, 427 US 50, 76 (1975) (Powell, J., concurring):

> "The unique situation presented by this ordinance calls, as cases in this area so often do, for a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression."

[45]This Court has always properly insisted on a proper record for making decisions based on First Amendment claims. Unfortunately, the *Con Ed* case in the New York courts was decided essentially on the pleadings. In the *LILCO* federal action, in which Amici NRDC, FOE and CAN were Intervenors/Defendants, extensive discovery resulted in a number of uncontroverted facts which may be helpful to this Court in determining the otherwise somewhat abstract questions presented here. Accordingly, reference to uncontroverted facts in the *LILCO* case will be made where relevant.

[46]Question 1 here roughly corresponds to Question 3, posed earlier on p. 13; Question 2 corresponds to Questions 1-2 on pp. 12-13; and the "legal conclusions" to Question 4 on p. 13.

answers; *i.e.*, that *none* of the interests protected by the First Amendment is threatened or damaged by the Commission's action, that the Commission's action has neither "suppressed" ideas nor placed the state on any side of a controversy[47] and that its action not only furthers substantial or compelling state interests, but does so by the least restrictive means available to it.

Amici will also discuss the New York Court of Appeals opinion, arguing that its use of the "time, place or manner" test is simply another way of making the necessary inquiry described above.[48]

Finally, Amici will argue that if the absolute restriction on use of bill inserts for controversial material is not the least restrictive means of achieving the State's legitimate and substantial interests, the bill inserts must constitutionally be seen as at least a limited public forum requiring access and "equal time" for dissenting views.[49]

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[47]See Point II, *infra*.

[48]In reconciling the general inquiry and the more formal test, conceptual difficulties concerning "public forum" and "content neutral" are, we believe, effectively eliminated. See discussion at Point III, *infra*.

[49]See discussion at Point V, *infra*.

POINT I

THE FIRST AMENDMENT INTERESTS OF INTERVENORS AND OTHER RATEPAYORS COMPEL, AND A NUMBER OF STRONG AND SUBSTANTIAL STATE INTERESTS REQUIRE, THE BAN ADOPTED BY THE COMMISSION.

Introduction

The Commission, the New York Court of Appeals and the District Court discussed five separate interests[50] in support of the Commission's bill insert ban. These were:

a) protection of ratepayors against compelled subsidy of political views with which they disagree;[51] and

b) protection of ratepayors against having offensive material unavoidably thrust on them in the privacy of their homes; and

c) compliance with non-discrimination provisions of the State Public Service Law; and

d) preservation of the limited resource for its primary, statutorily mandated purpose of providing consumer, billing and rate information; and

e) preventing the bill insert mechanism from becoming a "public forum," thus involving the Commission in constant, administratively difficult and unnecessarily intrusive monitoring

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[50]These interests will be discussed, *seriatim*, at Subpoints A-E of this Point I. The Commission recognized all five interests; the New York Court of Appeals relied primarily on the privacy issue (b), and the District Court omitted only the subsidy issue (a).

[51]Neither the New York Court of Appeals nor the District Court reached this issue, although the PSC quite clearly and correctly did. See 42a, 67a, fn. 1.

of an access scheme mandated by the First Amendment.[52]

Amici agree that, separately or together, these constitute important, substantial or compelling "state interests" which are more than sufficient to sustain the Commission's ban. However, Amici also represent real ratepayors who assert their own individual, independent First Amendment rights,[53] rights which conflict with those alleged by the utilities. As we argue below, the First Amendment rights of the ratepayors clearly outweigh the utilities' alleged rights and not only support but independently compel the ban adopted by the Commission and affirmed by the New York Court of Appeals and the District Court.

A) Avoidance of a Forced Subsidy by Ratepayors

Utilities are state-created monopolies. Gas and electric customers have no choice but to buy from the utility which the state has franchised to serve their area. Because there is no competition in the traditional sense, and because of the enormous economic benefit given the utility by virtue of its monopoly position, the state can and must regulate the rates charged by utilities to insure that they reflect only the costs of providing necessary services to their customers.[54]

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[52]The Commission expressed the sense that an absolute ban was administratively necessary as a lesser intrusion in protected First Amendment areas, see 66a-67a.

[53]These are the rights to be free from forced subsidy and from unavoidable intrusion of offensive material into their homes, described as (a) and (b) above.

[54]The state, in regulating rates, must also provide a reasonable rate of return to utility shareholders; this is required to insure sufficient capital formation for the utility to engage in necessary construction and expansion. However, because of the monopoly position conferred upon utilities, this Court has held that a public utility is entitled to a return commensurate with earnings of firms that face similar risks, but that a regulated firm has "no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 US 679, 692-93 (1923).

This special relationship between utilities and their customers is one important substantial basis for the ban on controversial bill inserts. In enacting the ban, the Commission expressed the long-established principle that

> "...it is wrong to expect ratepayors to finance [utility company] participation [in political propaganda]." (43a)

The reason for this, of course, is that ratepayors derive no service-related benefits[55] from the company's political advertising.[56] The purpose of such advertising is to benefit the utility's shareholders,[57] and under

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[55]This view has been clearly articulated by the Federal Power Commission, *Alabama Power Company*, 24 FPC 278, 286 (1960), *aff'd sub nom., Southwestern Electric Power v. FPC*, 304 F.2d 29 (5th Cir. 1962). The Commission has similarly viewed the lack of direct service benefits as a ground for excluding the costs of political advertising from the rate base. See, *e.g., Policy Statement* at 41a-42a; *Reconsideration* at 60a. Significantly, it has recognized that certain other kinds of advertising, *e.g.*,

> "appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates; new billing practices..."

in fact benefit ratepayors, and so are chargeable to them. *Policy Statement* at 43a.

[56]There is no question that pro-nuclear bill inserts constitute "political advertising." Ads which emphasize the importance of nuclear power plants and which urge their timely building have been held by the FPC to be political advertising which must be classified as a non-operating expense. Letter from L.H. Drennan, Jr., FPC Chief Accountant, to the Hon. Philip A. Hart, Chairman, U.S. Senate Subcommittee on the Environment, Senate Subcommittee on Commerce, October 30, 1974. See also, *Public Media Center v. FCC*, 587 F.2d 1322 (D.C. Cir. 1978).

[57]See, *e.g., Policy Statement* at 41a-42a; *Southwestern Electric Power Co. v. FPC, supra* at p. 41.

standard state and federal utility accounting practice, it is they who must pay the cost of such advertising.[58]

This axiom of utility rate regulation also stands on a firm constitutional base, recognized by the Commission. The First Amendment clearly protects individuals from any compulsion to support political views with which they disagree,[59] whether such compelled support be expressive, see *Wooley v. Maynard*, 430 US 705 (1977) (compulsory display of ideologically objectionable slogan); *West Virginia Board of Education v. Barnette*, 319 US 624 (1943) (compelled flag statute) or monetary, *Abood v. District Board of Education*, 431 US 209, 234 (1977) (compelled union dues used to support political candidates). In its *Reconsideration*, the Commission cited *Abood*, finding it

> "...questionable whether ratepayors should be compelled to support views with which they do not agree." (67a)

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[58]The costs of political advertising are classified within Account 426.4, Expenditures for Certain Civil, Political and Related Activities. 16 NYCRR Chapter II, Account 426.4. Account 426.4 is derived from the Federal Power Commission (FPC) Uniform System, FPC Order No. 276, 30 FPC 1539, 18 CFR 101.426.4. These accounts are "below the line" expenses; *i.e.*, they are not properly income deductions, and so are chargeable to shareholders, not ratepayors. *Alabama Power Company, supra.* State cases have uniformly followed the federal practice of excluding political advertising from the rate base. See, *e.g., Boushey v. PG&E Co.*, 10 P.U.R. 4th 23, 27 (Cal. P.U.C. 1975) (bill insert opposing referendum on Coastal Conservation Act may not be charged to ratepayors directly or indirectly); *Southern Bell Telephone and Telegraph Co. v. La. P.S.C.*, 239 La. 175, 32 P.U.R. 3d 2 (La. S. Ct. 1960); *In re Pacific Power & Light*, 34 P.U.R. 3d 36 (Ore. P.U.C. 1960).

[59]This is the third interest protected by the First Amendment — the right to individual self-expression, see p. 12, fn. 36, *supra.* It is also, significantly, the interest whose protection is not implicated in the regulation of commercial, or corporate, as opposed to individual speech. See *First National Bank of Boston v. Bellotti*, ____*US*____, 98 S. Ct. 1407 (1978).

Thus the Commission had two powerful reasons for prohibiting controversial or "political"[60] bill inserts: a state regulatory interest in insuring that utility ratepayors only bear the cost of service-related benefits,[61] and the First Amendment's prohibition on compelled political subsidies.[62]

Despite these two clearly articulated interests, the New York Court of Appeals never reached the issue of forced subsidy. The District Court generally discussed, without resolving, the issue of cost allocation.[63] The District Court's opinion suggests, but does not hold, that if some magic formula could be devised which would shift all the monetary costs of bill propaganda to shareholders,[64] the statutory and constitutional problems of forced subsidy would disappear.

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[60]The Commission made it clear that it uses the terms "controversial matter of public policy" and "political" virtually synonymously. See *infra* at pp. 52-53.

[61]This could also be conceptually viewed as protecting ratepayors from unnecessarily or unlawfully subsidizing shareholders for costs clearly incurred for the latter's benefit.

[62]As Thomas Jefferson stated:

> "to compel a man to furnish contributions of money for the propagation of opinion which he disbelieves is sinful and tyrannical" I. Brant, *James Madison: The Nationalist*, 354 (1948) quoted in *Abood, supra* at p. 235, n. 31.

[63]Because Amici believe the subsidy issue is so critical, and because only the District Court discussed it, this section will focus on the District Court opinion. The District Court incorrectly viewed the allocation issue as simply an administrative problem, entirely ignoring its constitutional aspects.

[64]For the reasons discussed *infra* at fn. 68, there is no such magic formula, and if there were, LILCO has indicated no desire to abide by it. It is precisely the fact that the shareholders save large amounts at the ratepayors' expense which makes the practice now banned by the Commission so attractive to LILCO and which undoubtedly provided the impetus for this litigation.

LILCO[65] contributed to this erroneous formulation of the issue in the District Court by a belated[66] and disingenuous offer to have its shareholders absorb all the *additional* out-of-pocket costs of placing its political messages in bill inserts. This offer also incorrectly assumed that if the allocation problem were solved, there would be no subsidy, hence no forced subsidy. This assumption is both factually and legally incorrect.

In fact, despite the District Court's speculations, the question of possible allocations is essentially irrelevant. The Commission correctly found[67] that accurate apportionment of costs properly chargeable to shareholders was impossible (67a).[68] Since there can be no

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[65]Because the only factual record as to subsidy was made in the District Court proceeding through discovery against LILCO, the discussion here will refer only to LILCO, although, of course, it applies equally in principle to Con Ed, Central Hudson, and all other utilities wishing to employ bill inserts.

[66]LILCO's "offer" on cost allocation was never made to the Commission, and was in fact tendered only after the District Court litigation began.

[67]The Commission, with long experience and substantial expertise in rate regulation and cost allocation, concluded that no fair allocation between the political and non-political uses of the billing process could be made (67a). As the regulatory agency charged with making such determinations, its decision is entitled to substantial deference by a reviewing court. See, *e.g., FCC v. National Citizens Committee for Broadcasting*, 436 US 775 (1977).

[68]The Commission advanced three arguments on the impossibility of accurate apportionment of costs: 1) apportionment ignores the reality that since bill envelopes are limited in size, LILCO's political messages take up space that could otherwise be used for useful conservation or service-related information — the value of which is problematic in terms of quantification; 2) any cost allocation could be circumvented by LILCO's cutting expenditures on customer service activities; 3) LILCO's electrical rates could be increased to offset loss of earnings due to allocation (JA 442, 443, 415). The California Public Utility Commission has made a similar determination that there can be no fair allocation. *Boushey, supra*, 10 P.U.R. 4th at p. 27.

fair or accurate allocation, there will always be some subsidy. Absent a complete proscription on controversial bill inserts, the utility will *always* derive an economic benefit by its use of the billing mechanism. This is so whether the ratepayors absorb all the costs, or as LILCO offered, the utility pays the costs directly attributable to insertion of the political material.[69] The real question then, is whether the Commission may or must act to prevent this forced subsidy. LILCO has attempted to persuade both this and the District Court that, under its offer, there would be no "subsidy" since it would be deriving only an "indirect benefit." Aside from the grossly misleading factual basis of this characterization,[70] it again mistakes the issue.

Since, as both the Commission and the District Court[71] found, there can be no "allocation" which does

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[69]There is, as District Judge Pratt recognized, a third alternative — that LILCO shareholders pay virtually *all* the costs of the bill mailing as well as the costs of its particular political bill inserts. This alternative is, of course, not properly before this Court. Amici do not believe that even this relatively extreme allocation would fully solve the problem of forced subsidy, since the utilities would still be deriving an economic benefit from the use of already created, up-to-date mailing lists, plant facilities, etc., paid for by ratepayors. In any event, for purposes of the summary judgment in the District Court, LILCO conceded that it will always derive at least an "intangible benefit" from its use of the billing insert mechanism (JA 342).

[70]The size of this "indirect benefit", as LILCO characterized it, can be very large indeed. Uncontroverted facts in the District Court record showed that if billing envelopes were not used to mail LILCO's pro-nuclear power inserts, LILCO shareholders would have to pay $117,000 for each first-class monthly mailing that contains such propaganda. The costs of envelopes and labor would increase this figure (JA 360). In 1975, for example, LILCO mailed four pro-nuclear power inserts, thus avoiding separate mailing cost of at least $468,000 (JA 358).

[71]The Court wrote that "[w]hatever allocation method might be used, however, to the extent that the cost of an insert is less than the cost of a separate mailing of the same insert, it would represent

(Footnote continued on next page)

not provide LILCO with *some* benefit, ratepayors will always be providing *some* degree of subsidy for LILCO's dissemination of political propaganda. The only question which remains is whether a non-cash or "indirect" subsidy which gives the utility a "free ride" is somehow distinguishable, for First Amendment purposes, from the directly compelled cash contribution struck down in *Abood, supra.*

As discussed below, neither logic, policy nor case law support such a distinction. For clarity of analysis we will first briefly discuss the First Amendment principles enunciated in *Abood* and other compelled subsidy cases, and, second, demonstrate the complete irrelevance of the cash/non-cash distinction which LILCO proposes.

1. The First Amendment Protects Individuals From Compulsory Subsidization of Political Views With Which They Disagree

This Court has long recognized that individuals may not, constitutionally, be compelled to finance the dissemination of ideas with which they disagree. *Abood, supra*; see *Buckley v. Valeo*, 424 US 1, 91, n. 124 (1976).[72] These cases most often arise in a labor context, and provide a striking analogy to the utility ratepayor situation. Union members, like ratepayors, have no choice but to pay their "dues" to an institution designated by

a benefit or 'free ride' to shareholders which had been paid for by ratepayors" (JA 444). Unfortunately, however, the Court simply let this finding drop, and never utilized it to determine the First Amendment subsidy issue raised by Intervenor.

[72]In upholding the constitutionality of public financing of presidential election campaigns this Court relied on the voluntary nature of the check-off system, distinguishing it from prohibited *compulsory* subsidation. *Involuntary* subsidies have, however, always been treated differently. See *Bellotti, supra* at p. 794, n. 34.

the government,[73] but the legality of the union shop does not support the notion that the exacted dues, fees or assessments can be

> "used as a cover for forcing ideological conformity or other action in contravention of the First Amendment...." *Railway Employees' Department v. Hanson*, 351 US 225, 238 (1956).

In *Abood*, this Court found "meritorious" the view that union members

> "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and express political views unrelated to its duties as exclusive bargaining representative."[74] *Abood, supra* at p. 234.

This Court cited a long line of cases holding that the government may not compel an individual to support any one ideological view without violating the First Amendment.[75] It reasoned that the same impermissible result follows where the government gives power to private groups[76] — like labor unions (or utility companies) — to abridge these same First Amendment rights.

[73]Congress may, consistent with the First Amendment, require employees to affiliate with a union as a condition of their employment. *Radio Officers Union v. NLRB*, 347 US 17 (1953). The state's grant of monopoly status to utilities similarly requires the ratepayor to obtain and pay for necessary services from a particular company. See *Utility Companies and the First Amendment, supra* at p. 925.

[74]This is analogous to the question of service-related benefits for utility ratepayors. See fn. 55, *supra.*

[75]See, *e.g., West Virginia Board v. Barnette, supra.*

[76]*Abood* appears to be unaffected by this Court's decision in *First National Bank v. Bellotti, supra.* See *Anderson v. City of Boston*, 380 N.E.2d 628 (Mass. 1978), *dismissed for want of a substantial federal question* at 99 S. Ct. 822, 59 L.Ed. 2d 26 (1979). In *First National Bank*, the majority found that there was no prohibited compulsion of *shareholders*, since the retention of corporate shares is entirely a matter of free choice, and shareholders who disagree with management's views may simply sell their shares. *Id.* at pp. 794-95. Justice

(Footnote continued on next page)

2. "Indirect" or Non-cash Subsidies Are Similarly Precluded by the First Amendment

If the First Amendment precludes involuntary direct cash subsidies to political causes, it is difficult to imagine that more sophisticated subsidization techniques may permissibly achieve the same result, yet that is precisely LILCO's position. This argument fails for two reasons.

a.) "Indirect" Subsidies

First, even though individual ratepayors may not be required to make a particular cash payment specifically for dissemination of LILCO's political views,[77] if LILCO is permitted to use the ratepayor-financed billing envelope for mailing its propaganda, its "saving" from the "free ride" it has received is the precise and functional equivalent of a cash contribution in that amount.[78] See *Retail Clerks International Association v. Schermerhorn*, 373 US 746 (1963).[79] This Court clearly recognized this principle in upholding the limitation in certain non-cash contributions on *Buckley v. Valeo, supra* at p. 37.

White, dissenting, argued that such "choice was illusory." Clearly, however, under either analysis, ratepayors, unlike shareholders, have no such choice to "opt out." See generally, *Note, Municipal Free Speech Banned in Boston*, 47 Fordham L. Rev. 1111, 1122-24, 1134-37 (1979).

[77]Clearly the Commission could not, under state law or the Constitution, require or permit each customer to pay $117,000/900,000 or $0.13 to do each pro-nuclear political mailing.

[78]*I.e.*, if the ratepayors pay $117,000 to mail a bill and LILCO pays nothing to use it, LILCO has saved $117,000 which it can use for any purposes — including additional political advertising in other forms — it wishes.

[79]Like the union budget discussed in that case, LILCO's budget of expenditures and income is balanced. If it may use funds involuntarily supplied by *all* ratepayors in order to disseminate viewpoints to which only LILCO management and *some* ratepayors subscribe, the company has more shareholder money available to it to engage in other forms of political advertising.

Further, dissenting ratepayors who disagree with LILCO's messages are bearing a disproportionate share of the costs associated with the legitimate, non-controversial aspects of day-to-day utility service. This "disproportionate share" is enough to constitute a "contribution" which may not constitutionally be compelled. See *Schermerhorn, supra* at p. 754.[80]

The fact that dissenting ratepayors are making an "indirect" rather than a direct contribution is, accordingly, irrelevant.[81]

b.) Non-cash Subsidies

LILCO made one final argument in its attempt to avoid the clear holding of *Abood*. This is, in essence, that because a free ride is free,[82] it is somehow not a pro-

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[80]For example, assume that there are two classes of LILCO ratepayors: those who agree with and those who dissent from its political message. Failure to proscribe controversial bill inserts has the effect of increasing LILCO's political advertising fund. The dissenting ratepayors are getting "less" for their dollar — *i.e.*, only utility service and not political propaganda suitable to their tastes. The ratepayors in agreement with LILCO are getting "more" for that same dollar — *i.e.*, the same utility service *plus* the ability to have their viewpoint (shared by LILCO management) foisted on other ratepayors, in an effort to change their minds. By this reasoning, enunciated in *Schermerhorn* but reiterated as recently as in *Abood, supra*, p. 237, fn. 35, the dissenting ratepayors are bearing a disproportionate share of the cost of utility service.

[81]As this Court wrote in *Buckley v. Valeo, supra* at pp. 36-37:

> "[t]he expenditure of resources at the candidate's direction for a fundraising event at a volunteer's residence or the provision of in-kind assistance in the form of food or beverages to be resold to raise funds or consumed by the participants in such an event provides material financial assistance to a candidate. The ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the fundraising event or the food."

[82]*I.e.*, it costs the donor nothing, or nothing more than s/he would be spending anyway. The correct focus in determining whether there is a subsidy is, however, on the *benefit* to the *recipient*. See discussion below.

hibited subsidy or contribution. But, as well settled case law demonstrates, a subsidy or contribution which may be regulated when received in cash may be similarly regulated when received in another form.[83] A number of analogies, including legislation controlling the franking privilege,[84] postal rates,[85] federal election

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[83]This is, of course, precisely what Congress determined, and what this Court upheld in *Buckley v. Valeo, supra* at pp. 36-37. See fn. 81, *supra*.

[84]Under the franking privilege, members of Congress may send certain information to their constituents free of charge. However, enclosing other, proscribed, material in the franked envelope is prohibited even though it would result in no additional cost to the taxpayers who ultimately bear the cost of the franked mailing. (See 39 USC § 3210(a)(5)(C) [Solicitation of political support prohibited], 39 USC § 3210(a)(5)(D) ["free rides" for material enclosed for the benefit of any person, organization, etc. prohibited]). These anti-free ride provisions have been uniformly upheld by Courts. *E.g., Rising v. Brown*, 313 F. Supp. 824 (C.D. Cal. 1970); *Schiaffo V. Helstoski*, 350 F. Supp. 1076 (D. N.J. 1972), *aff'd in part, rev'd in part*, 492 F.2d 413 (3d Cir. 1972).

[85]For an application of the anti-free ride rule in this area, see 39 USC § 4554(a)(1) and § 4555(a) which define content requirements for fourth-class postal rates. If any improper material is enclosed with the fourth-class matter — *e.g.*, personal correspondence — the reduced postage rate is forfeited.

campaign contributions,[86] and of course, the "free ride"[87] itself support this conclusion.

Since the law clearly may and does proscribe subsidies which are no more than "free rides," it must, under the reasoning of *Abood, Schermerhorn, et al.*, proscribe similar subsidies when this is necessary to protect the First Amendment rights of dissenting ratepayors.

In two recent cases, lower courts have enjoined, on constitutional grounds, the very kinds of non-cash subsidies which LILCO argues the Commission is powerless to prevent, *Anderson v. City of Boston, supra*;[88] *Moun-*

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[86]Under the Federal Election Campaign Act of 1971, as amended, corporations are forbidden from making contributions or expenditures in connection with Presidential or Congressional elections. 2 USC § 441(b). Proscribed "contributions" include:

> "...any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services or *anything of value....*" *Id.* (emphasis added)

The Federal Election Commission, which is charged with interpreting the Act, has frequently dealt with the argument that non-cash contributions or expenditures are different from cash subsidies. It has consistently rejected such arguments, focusing not on the cost to the donor, even if minimal or non-existent, but on the "benefit" to the candidate provided by the donor's assistance. See, *e.g.*, AO 1975-4 [1975] FED. ELEC. CAM. GUIDE (CCH) § 34084 [the donation of the use of a computer]; AO 1975-4 [1975] FED. ELEC. CAM. GUIDE (CCH) § 5104; OC-1975-100 [the endorsement or guarantee of a loan]; OC-1975-107, Letter of March 2, 1976, from John G. Murphy, General Counsel for the FEC, to Julie Noel Gilbert [the provision by a hotel of free furniture for apartments occupied by political staffers].

[87]The classic, prototypical anti-free ride statute is 49 USC § 1(7) which prohibits "free rides" for all but certain classes of passengers on railroads and other carriers. The New York counterpart of the federal anti-free ride statute is N.Y. Transp. Law § 103.

[88]The Massachusetts Supreme Court held that the

> "use of telephones and printed materials provided by public funds, and...use [by volunteers] of facilities paid for by public funds, would be improper, at least unless each side were given equal representation and access." 380 N.E.2d at p. 641.

Its opinion relied heavily on the decisions in *Abood, supra*, and *Buckley, supra*.

tain States Legal Foundation v. Denver School District, 459 F. Supp. 357 (D. Col. 1978).[89] In both cases, there was no issue of monetary contribution, but certain facilities were used to further a particular political viewpoint. The facilities used in both cases were financed by "publicly collected funds."[90] *Id.* at p. 361.

The funds collected by LILCO from ratepayors are, similarly, publicly collected.[91] The facilities they finance, *e.g.*, postage, envelopes, customer lists, and related mailing and stuffing expenses, may not, similarly, be used to disseminate one side of a political issue without violating the First Amendment's proscription against compelled subsidies.

For all these reasons, the Commission's ban on controversial bill inserts is necessary to prevent a forced

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[89]The District Court found a First Amendment violation where a school board allowed its telephones and facilities to be used during non-working hours by volunteers for the purpose of contacting the public to urge the defeat of a referendum.

[90]See also, *Cammarano v. United States*, 358 US 498, 515 (1959) (Douglas, J., concurring):

> "[The taxpayers'] proposition savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions *(Grosjean v. American Press Co.*, 297 US 233, 250; *Murdock v. Pennsylvania*, 319 US 105, 112; *Follett v. McCormick, supra*, at 578*)*, and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights. See *McCollum v. Board of Education*, 333 US 203."

Significantly, in *McCollum*, cited with approval by Justice Douglas, this Court struck down the use of school facilities for religious purposes as an unconstitutional subsidy.

[91]As discussed *infra* at fn. 155, the Commission has determined that if it permitted LILCO to use the ratepayor-financed bill insert mechanism it would clearly be engaging in "state action." It is the power and obligation of the State to set rates and regulate their collection which makes the funds "publicly collected," although such a determination is not required by *Abood*.

subsidy of LILCO's and all other utilities' political views by their ratepayors. As such it is permissible as a matter of state law and compelled as a matter of constitutional law.

B) Protection of Privacy in the Home and the "Captive Audience"

The second "state interest" supporting the Commission's ban and relied upon by the New York Court of Appeals (10a) is the protection of ratepayors, in the privacy of their homes, from having offensive and/or disagreeable ideas unavoidably thrust upon them. Like forced subsidy, this separate First Amendment interest of ratepayors[92] is, in and of itself, sufficient ground for upholding the ban under both the general First Amendment analysis offered here, and under specific decisions of this Court dealing with offensive mail and the degree of protection accorded to privacy in the home.

It is unquestioned that the State has the policy power

> "...to protect the peaceful enjoyment of the home" *Hynes v. Mayor of Oradell, supra* at 619.

Where "offensive material" may unwelcomely intrude on the privacy of the home,

> "...the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder." *FCC v. Pacifica Foundation*, 438 US 726 (1978). [93]

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[92]As this Court has written,

> "...the right of every person 'to be let alone' must be placed on the scales with the right of others to communicate." *Rowan v. Post Office Dept.*, 397 US 728, 736 (1970).

[93]This is not unlike this Court's previous holding that

> "[w]e...categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another." *Rowan, supra* at p. 738.

Thus, the operative concepts are 1) "offensive material" which is 2) unavoidably "thrust upon" 3) an unwilling receiver, in 4) the privacy of his or her home. All four requirements of the *Rowan-Lehman-Pacifica* test are met in the use of the billing mechanism for dissemination of a utility's views on controversial issues. See, *FCC v. Pacifica Foundation, supra; Lehman v. City of Shaker Heights*, 418 US 298 (1974); *Rowan v. Post Office Dept., supra.*

That the utility's views may be offensive to some ratepayors[94] has not been seriously contested.[95] The "unavoidability" of contact with the potentially offensive message is inherent in the "necessity"[96] of the ratepayor opening his or her utility bill. Like the rider of public transit, but to a far greater degree, the ratepayor who receives a utility bill has no choice but to be exposed to

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[94]As this Court has recognized,

> "...what may not be provocative to one person may well be to another...." *Rowan, supra* at p. 737.

[95]In the federal court action, LILCO admitted that some of its ratepayors "would be genuinely upset by an insert." We note also that for the same reasons "sexually explicit pictorial material" which is "not obscene," may be "deeply disturbing...," pro-nuclear propaganda, which many see as involving the "rape" of nature and "the destruction of future generations," is equally "disturbing." *Cf., Public Media Center v. FCC, supra.*

[96]As this Court noted in an earlier case dealing with street cars, a public utility,

> "...a streetcar audience is a captive audience because it is there *by necessity, not choice.*" *PUC v. Pollak*, 343 US 451, 460 (1952); see, *Lehman v. City of Shaker Heights, supra.*

its contents[97] — he or she is, accordingly, truly a member of a "captive audience."[98]

The unwilling receiver who is part of a "captive audience" is entitled to far more protection in the home than s/he is elsewhere. For example, whatever the interest of an individual in avoiding unwelcome and offensive messages "...in a courthouse corridor...," this Court has held

> "...surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home." *Cohen v. California, supra* at p. 22.

Further, unlike absolute bans on canvassing which have been struck down by this Court[99] on the grounds that they unfairly or unreasonably[100] preclude the only available means by which a speaker's message can be conveyed,[101] or requirements that a householder

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[97]The absolute necessity to open and view the content of a utility *bill*, if one wishes to maintain vital services, is far different from the homeowner's ability to throw away junk mail unopened, or to exclude the unknown or undesired canvasser from his/her house (JA 407).

[98]The "necessity" factor here distinguishes the instant case — and *Lehman* — from the canvassing cases relied upon by the utilities. There the homeowner has an unfettered ability to exclude the unwelcome visitor. Here s/he does so only at the cost of doing without an essential service, *cf., Jackson v. Metropolitan Edison Co.*, 419 US 345 (1974), since not to open the bill means not to pay it; not to pay it means deprivation of electric service.

[99]It should be noted that many of the anti-canvassing bans which this Court has refused to uphold have been deemed constitutionally infirm because of vagueness, overbreadth, lack of a review procedure, uncircumscribed discretion in local officials, etc., none of which is present in the instant case. See Point IV, *infra.*

[100]*E.g., Martin v. Struthers, supra; Hynes v. Mayor of Oradell, supra.*

[101]See, *Lamont v. Postmaster General*, 381 US 301 (1965) where, in order to receive otherwise protected political information, an individual was essentially required to officially designate him/herself a "Communist sympathizer," a requirement which this Court found would have a deterrent effect, especially to those with sensitive positions. *Id.* at p. 307.

must specifically and publicly request information on unpopular views in order to receive it, the decision about whether individuals in the community may receive a utility's views is not a matter of governmental prohibition, but, at best, only of the utility's pocketbook!

Precluded from the compulsory, obtrusive and privacy-invading use of the billing mechanism, the utilities stand on precisely the same footing[102] as anyone else who wishes to communicate their views to citizens *through the mails*. The citizen who receives a utility's pro-nuclear propaganda in any envelope other than her/his utility bill may open and peruse it, or throw the envelope away unread. The Commission's ban is, accordingly the *only* way to insure that the homeowner or addressee makes the final judgment as to what is or is not to be admitted to her/his "castle." *Rowan, supra.*

C) Compliance with Non-Discrimination Provisions of State Law

Another state interest advanced by the Commission was its finding that use of the bill insert,

> "confers an unreasonable advantage on management that discriminates against others who may not share or who oppose the company's views." (65a)

This was no abstract attempt to "equalize speech resources," as LILCO has argued. Rather, the Commission's finding and the limited ban it imposed was a proper and necessary action under applicable state utility law which prohibits

[102]See, *e.g., Cammarano v. United States, supra* at p. 513. *Cf. First National Bank of Boston v. Bellotti, supra* at 782.

> "undue or unreasonable preference or advantage" in "service," "privilege or facility."[103]

The New York statutory scheme does not seek to equalize speech resources by muting or silencing "stronger" voices. Instead, as the New York Courts have found, it requires all utilities[104] to provide service equally, and without favor, to all its customers. See, *e.g., Hayes v. Niagara Mohawk Power Corp.*, 63 Misc. 2d 581, 312 NYS 2d 436, 437 (Sup. Ct. Onondaga Co. 1970); *Brewer v. Brooklyn Union Gas Company, supra*, 33 Misc. 2d at 1019.

"Service" necessarily includes the mailing of bills and other enclosed materials,[105] *cf., Pollak v. Public*

[103]Under applicable law, utility companies are prohibited from making or granting

> "...any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject[ing] any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." NY. Pub. Serv. Law, § 65(3)

or from extending

> "...to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons under like circumstances." NY Pub. Serv. Law, § 66(12)

[104]It must again be emphasized that the utilities are not ordinary commercial entities competing with similar entities in the marketplace, but providers of essential services whose monopoly position has been conferred by the state's franchising power. Concomitant with this unnatural advantage is the obligation to serve the public interest; this obligation is the basis of the Public Service Law and the PSC's regulations. See, *e.g., Brewer v. Brooklyn Union Gas. Co.*, 33 Misc. 2d 1015, 228 N.Y.S.2d 177, 182 (Sup. Ct. 1962).

[105]Clearly it is the "service" aspect of billing and bill inserts which gives the Commission the power and obligation to regulate them (4a).

Utilities Commission, 191 F.2d 450 (D.C. Cir. 1951), *rev'd on other grounds*, 343 US 451 (1952).[106] Similarly, the billing mechanism is a "facility," whose use for political purposes would clearly constitute a "privilege."

The Commission could statutorily and constitutionally prohibit a utility from charging lower rates to customers of whose politics it approved. It could also bar a utility from permitting free use of the company auditorium by Republicans rather than Democrats. For the same reasons, and under the same authority, the Commission properly prevented use of the billing mechanism as a conduit for pro-nuclear propaganda favoring corporate management and shareholders to the detriment of Amici and other customers.

D) Preservation of Bill Inserts for Necessary and Required Consumer or Ratepayor Information

Another important state interest advanced by the Commission was the necessity to preserve and conserve

> "...the primary function of bill inserts, namely, to convey information that is clearly helpful to consumers." (JA 454)

The Commission's power to regulate bill inserts[107] must be exercised to insure those "useful and necessary services which facilitate...the 'distribution' and 'sale' of utility power." *Matter of National Merchandising Corp. v. Public Service Commission*, 5 N.Y.2d 485, 490-91, 186 NYS2d 47, 50-51 (1959); N.Y. Pub. Serv.

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[106]In that case the term "service" was broadly defined to include the playing of music on buses. In any event, what is or is not a "service" for this purpose is a matter of state law. The Commission has held that billing is a service, the New York Court of Appeals did not disagree, and the matter is foreclosed.

[107]The Legislature has granted the Commission express authority "to fix and regulate the format and informational requirements of bills utilized by public and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity...." NY Pub. Serv. Law § 66(12-a).

Law § 82(10)-(12). It has regulated utility bill inserts to provide just those facilitating services, *e.g.*,

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like. *Policy Statement* (44a)

In addition to identifying these "services" which the bill insert can and should perform,[108] the Commission has recognized that

> "The bill insert is not only a unique medium of communication, it is also quite limited." *Reconsideration* (65a)[109]

Accordingly, the Commission found that prohibition of the use of bill inserts for political propaganda was necessary to conserve that limited resource for its primary, proper and statutorily mandated purposes (65a). This finding constitutes an independent, significant state interest served by the ban.

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[108]The efficacy of bill inserts in conveying non-controversial consumer information about issues like rates and billing procedures was demonstrated by a survey commissioned by LILCO which is part of the record in the federal case (JA 403).

[109]The limitation is not only of size and weight (*i.e.*, that the insert fit within the billing envelope without increasing postage costs), but of frequency, since

> "an insert can be used only so often as a bill is sent by the utility company, usually once a month, but in many cases only once in every other month." *Id.*

E) Avoidance of a Public Forum/First Amendment Difficulties of Administering a Shared Access Scheme

Although the New York Court of Appeals did not address the issue, the District Court found that the final state interest furthered by the Commission's ban was the "avoidance" of the emergence of a public forum, and the Commission's careful consideration and resolution of the public forum/shared access issue[110] shows extreme sensitivity to all the First Amendment implications of that issue.

What the Commission actually did, and what the District Court ratified, was to find that an absolute ban on use of the bill insert mechanism for controversial material was a less restrictive intrusion on First Amendment rights than its otherwise constitutionally compelled involvement in administering a shared access scheme.

It cannot be said that in rejecting "shared access," the Commission acted unreasonably. The same concerns it expressed about endless litigation, the unfairness of administering such a scheme,[111] etc. were found to have substance in connection with a paid access scheme that this Court found could reasonably be rejected by the Federal Communications Commission. *Columbia Broadcasting System v. Democratic National Committee*, 412 US 94 (1973).

Accordingly, the Commission's and District Court's determination that an absolute ban was less restrictive of First Amendment interests than the creation of a

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[110]See discussion at Point V, *infra*.

[111]Administering an access scheme is not only time-consuming and difficult — thus taking the Commission's energies from its other statutorily compelled obligations to the public — it also involves the Commission (and hence the "State") in extremely intrusive decisions about content, viewpoints, proper balance on particular issues, etc., which would raise a whole host of First Amendment problems.

public or quasi-public forum with concomitant access requirements[112] provides a final "state interest" for sustaining the ban.

POINT II

THERE IS NO NEGATIVE EFFECT EITHER ON A UTILITY'S RIGHT OR ABILITY TO SPEAK, OR ON THE INTERESTS PROTECTED BY THE FIRST AMENDMENT.

As already discussed, there are a number of "substantial," "important" and even "compelling" state interests, as well as First Amendment rights of Amici and others which require the limited ban adopted by the PSC. The question which remains — and which can be easily disposed of — is what, if any, prohibited "abridgement" of the utilities' First Amendment rights results from the ban. Implicit in our analysis, though conceptually separate, is the related question of what, if any, negative or detrimental effects the ban has on any

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[112]Given the general First Amendment analysis we have engaged in, and particularly looking to the opposing First Amendment rights of ratepayors discussed *supra* at Points I (A) and (B), the ban can be sustained without this Court deciding this issue one way or another. If, however, the Court reaches the issue and finds the ban was *not* the least restrictive means available, it must also hold that shared access is, and remand so that the Commission may institute such a scheme consistent with its First Amendment obligations.

of the interests protected by the First Amendment. The answer to both questions, clearly, is none.[113]

This is not a case where a utility is forbidden to speak its views on a particular matter, see, *e.g., Linmark Associates, Inc. v. Willingboro*, 431 US 85 (1977), nor on "political" issues in general, *e.g., First National Bank of Boston v. Bellotti, supra.* The Commission's limited ban does not prohibit a utility from using the only means, or only practical means to convey its view. *E.g., Hynes v. Mayor of Oradell, supra* at pp. 624-628 (Brennan, J., concurring).[114]

After the ban, as before it, a utility is free to speak its views on controversial matters by every conceivable means. It can, as LILCO has in the past, employ newspapers, the broadcast media, distribution of literature,

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[113]This is similar to Justice Powell's analysis — and conclusion — in *Young v. American Mini-Theatres, supra* at p. 78 (concurring op.). In examining "the effect of [the challenged] ordinance upon freedom of expression," he found "essentially two inquiries." These were:

> "(i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and
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> (ii) does it restrict in any significant way the viewing of those movies by those who desire to see them?" *Id.*

He found, as the New York Court of Appeals and District Court have already held in this case,

> "On the record in this case, these inquiries must be answered in the negative." *Id.*

[114]In *Hynes*, this Court struck down a municipal ordinance requiring advance notice to the police department before canvassing, soliciting, or otherwise calling from house to house, although other means of communication, such as direct mail, were theroretically available because, as Justice Brennan wrote, "[t]he oppressive financial burden of campaigning makes reliance on volunteers absolutely essential." The cost of sending a separate mailing expressing its views clearly would not be "oppressive" to a utility, as the record in the federal case demonstrates.

public meetings[115] and the like. Even more significantly, a utility is perfectly free to utilize the mails and the mailbox of each homeowner on the same basis *as any other speaker* who wishes to convey his/her views on any issue (JA 454).[116]

As this Court wrote, upholding the denial of a business tax deduction for certain political speech,

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but *are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do* under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' " *Cammarano v. United States, supra* at p. 513. (emphasis added)

Similarly, the even-handed treatment of utilities is not aimed at the suppression of their ideas, and their First Amendment rights have not in any way been "abridged" by the Commission's limited ban.[117]

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[115]The record in *LILCO* shows that it has, to a greater or lesser extent, employed all these other means to convey its views on, *e.g.*, the desirability of nuclear power (JA 365, 379).

[116]If Amici or others were permitted to use utility bills for dissemination of their views, the situation would, of course, be different. This unfair "enhancement" of speech channels for one side was, however, what the Commission attempted to avoid in preventing bill inserts from becoming a "public forum." See Point I (E), *supra.*

[117]This Court has recognized that the imposition of some additional cost on the ability of a regulated business to speak does not necessarily infringe that business's First Amendment rights. See *Young v. American Mini-Theatres, supra* at p. 78 (Powell, J., concurring) ("The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in the business.") Here, of course, a utility isn't required to spend *more* than anyone else; it is simply denied a "free ride" at the unwilling public's expense. See Point I (A), *supra.*

Abridgement of relevant interests protected by the First Amendment,[118] *i.e.*, preservation of a free marketplace of ideas and that "robust debate" necessary to informed self-government, is equally absent in this case. Individual citizens are not prevented from obtaining information which they need to make important choices in their lives, see *e.g., Virginia State Board, supra*, nor are they denied factual matter "of clear public interest," *Bigelow v. Virginia*, 421 US 809, 822 (1975).[119] The ban does not result in the suppression of information which "inhibits public scrutiny" and the "free discussion of governmental affairs," *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 US 829, 838 (1978), nor does it "dampe[n] the vigor and limi[t] the variety of public debate." *Miami Herald Publishing Co. v. Tornillo, supra* at p. 257,[120] quoting *NY Times v. Sullivan, supra.*

[118]The third interest which is sometimes seen as included with the First Amendment's prohibition on the abridgement of freedom of speech is that of the value of and necessity for individual self-expression. See, *e.g.*, fn. 36, *supra* at p. 13. This interest, unlike the other two, is however, *not* implicated in the case of speech by a commercial entity. See, *e.g., Bellotti, supra* at 777, fn. 12 (Opinion of the Court) and 804-805 (Dissenting Opinion of White, J.); *Roberts, supra* at 138-139, 144.

[119]In that case, unlike *Virginia State Board*, the protected commercial speech "did more than simply propose a commercial transaction." In announcing the availability of abortions in New York, "the advertisement related to activity with which, in at least some respects, the State could not interfere." *Virginia State Board, supra* at p. 760.

[120]The constitutional vice of the press "right to reply" statute struck down in *Tornillo* was the fear that newspapers would steer away from controversy which would require a reply, thus limiting public debate on many issues. It is significant that this Court reached a different result in upholding the fairness doctrine in *Red Lion, supra*. There the necessity for regulation was justified by the advantage conferred on the licensee in awarding it the use of a limited resource, and the concomitant obligation to use that resource "in the public interest." A utility's monopoly position and its obligation to operate "in the public interest" make *Red Lion* the more analogous case, though here, as in neither *Tornillo* nor *Red Lion*, there is no real limitation on the ability to engage in debate.

The record in the *LILCO* case showed that the advisability of nuclear power has been widely discussed in Long Island, with all views, including LILCO's, well aired (JA 334). Public knowledge of, and ability to make electoral decisions about this and other "controversial matters of public interest" on which LILCO or any other utility wishes to express its views are in no way diminished by a utility's inability to use utility bill inserts to convey those views.

As Justice Powell wrote about the ordinance in *Young, supra*, the effect of the ban here on both a utility's right to speak, or the public's right and need to hear "...is incidental and minimal." Whatever test may be applied in the instant case, the "incidental and minimal"[121] effect on a utility's First Amendment rights cannot defeat the important and substantial State interests advanced by the Commission, and the First Amendment rights of Amici and other ratepayors.

POINT III

THE COMMISSION'S BAN WAS PROPERLY UPHELD AS A REASONABLE TIME PLACE OR MANNER RESTRICTION.

The New York Court of Appeals found that the bill insert ban was sustainable as a reasonable time, place or manner restriction, since it satisfied all criteria necessary to meet that test, *i.e.*, that it was content-

[121]He also noted, as is equally applicable here,

"The communication involved here is not a kind in which the content of effectiveness of the message depends in some measure upon where or how it is conveyed. *Cf., Cox v. Louisiana*, 379 US 536 (1965); *Brown v. Louisiana*, 383 US 131 (1966); *Police Dept. of Chicago v. Mosley*, 408 US 92, 93 (1972)." *Young v. American Mini-Theatres, supra* at p. 78, n. 2 (Powell, J., concurring).

neutral, supported a significant government interest, and did not foreclose alternative channels of communication (9a-11a).

The District Court also wrote about reasonable time, place or manner, but had somewhat more difficulty fitting the PSC ban into the parameters of that test, since it found the general analysis "broke down" on the issue of content neutrality.[122]

The difference in opinions below points up one apparent analytical difficulty with use of the test as it has been applied to the question of content neutrality in the past. Additionally, Amici recognize a small but additional "gap" between this Court's actual decisions[123] in this area, and the use of the test in this case, *i.e.*, the extension of the time, place or manner test to restrictions of speech in places other than public streets and parks.[124]

Because Amici have set out to aid this Court in constructing a rigorous and complete conceptual framework, we will demonstrate that these "problems" are

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[122]The District Court ultimately did not sustain the PSC ban as a reasonable time, place or manner restriction, but rather on a combination theory which also relied on this Court's opinions in *Lehman v. City of Shaker Heights, supra.*

[123]There is, as discussed *infra*, no substantial difference between this Court's *holdings* in cases where the "time place and manner" test was dispositive, and to dicta extending that test in cases where it was not finally applied, or was merely suggested as a mode of analysis. Significantly, however, lower courts have taken the extension of the test as law and have used it as the basis for upholding regulations outside the area of parks and streets which is safely bounded by precedent. See, *e.g., John Donnelly & Sons v. Mallar,* 453 F. Supp. 1272 (D. Me. 1978) (privately-owned billboards). *Accord, Washington v. Lotze,* _____P.2d_____, 5 Med. L. Rep. 1069, 1072 (Wash. S. Ct. 1979).

[124]See footnote 27, *supra.*

resolved by careful analysis of this Court's decisions,[125] and by understanding the reasonable time, place or manner test as a mode of analysis which takes into account the various First Amendment interests already discussed.

A) Extension of Time, Place and Manner Beyond the Streets and Parks

Historically, this Court has upheld restrictions on speech as reasonable regulations of time, place or manner in traditional public fora such as streets, sidewalks. See, *e.g.*, Tribe, *supra* at pp. 688-89;[126] *Poulos v. New Hampshire*, 345 US 395, 398 (1953); *Kovacs v. Cooper*, 336 US 77 (1949)(public streets); *Cox v. New Hempshire, supra* (public sidewalks).

Recently, however, this Court has referred to time, place or manner regulations in cases far removed from

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[125]Some commentators have suggested that this Court's opinions in this area are "unhelpful", see, *e.g.*, Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 Univ. Chicago L. Rev. 81, 99 (1978) (hereinafter "Stone"). Stone's article, like the work of Tribe and Amici in this brief, is an attempt to aid this Court in imposing order and developing a coherent theory from apparently contradictory, but clearly reconcilable opinions.

[126]Tribe analyzes the development of the concept of public forum and the test of reasonable time place or manner regulation simultaneously. He writes that the classification of streets, sidewalks and parks

> "...as public forums serves as constitutional shorthand for the proposition that, in addition to its usual obligation of content neutrality...government cannot regulate speech related conduct in such places except in narrow ways shown to be necessary to serve significant governmental interests... [in] such places...more focused regulations of 'time, place or manner' are constitutionally compelled." *Id.*, footnotes omitted.

A key concept here is the recognition that it is speech-related *conduct* which is being regulated; just as the government can reasonably regulate the place where picketers *march* with their messages, so here the state restricts only a utility's action in placing its message in utility bills, not the message itself.

these traditional settings, clearly implying that if the three "tests" of reasonable time, place or manner were met, the challenged governmental action would be upheld. See, *e.g., Virginia State Board*, 425 US at p. 771;[127] *Linmark Associates, Inc. v. Willingboro*, 431 US at p. 93;[128] *Buckley v. Valeo*, 424 US at p. 18.

To the extent that dicta in these and other recent cases has expanded the boundaries of speech-related conduct[129] properly subject to reasonable time, place or manner restrictions, it is apparent that this Court is in fact engaging in the kind of analysis previously suggested;[130] and that, accordingly, in making the same kind of analysis, the New York Court of Appeals acted permissibly in upholding the bill insert ban as a reasonable "time, place or manner" restriction.

[127]In *Virginia State Board* and *Linmark*, this Court has written that "...laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether," although *Virginia State Board* involved a prohibition on the advertising of prescription drug prices, and *Linmark* challenged the prohibition of "For Sale" signs on private property.

[128]In *Linmark*, for example, the challenged ordinance could not be justified as a reasonable "time place or manner" regulation because it failed to leave open ample alternative channels for communication, and because it "proscribed particular types of signs based on their content because [the town] fear[ed] their 'primary' effect — that they will cause those receiving the information to act upon it." *Id.* at p. 94. For a discussion of the connection between the content neutral test and regulations aimed at 'primary effect,' see Point III (B), *infra* at pp. 49-51.

[129]Again we note Tribe's highly technical but critical observation. It is precisely that these cases are about regulation of conduct — of "means" of speech, however closely related to the speech — that makes the "time place or manner" test and the *O'Brien* test so similar that at least some Justices have used them virtually interchangeably. See, *e.g., Young v. American Mini-Theatres, supra* at pp. 79-80 (Powell, J., concurring).

B) Relationship of the Ban to the Content of the Regulated Speech

The District Court found that,

> "[t]he third test for a valid time, place or manner restriction, however, is missing here, for it cannot be said that PSC's ban on the use of bill inserts to express views on 'controversial issues of public policy' is unrelated to the content of the regulated speech. Indeed, it is precisely because of content... controversial issues — that LILCO has been denied access to bill inserts as a medium for advocating nuclear power." (JA 455-56)

However, the Court determined that the "content-based" nature of the restriction was not dispositive, based primarily on its careful reading[131] of the plurality[132] and

[130]*I.e.*, a consideration of the state interests promoted by the regulation "weighed" in some manner against the costs to interests protected and promoted by the First Amendment. See Conceptual Framework, pp. 10-15, *supra*. This Court has in fact suggested the shift from "test" to analysis in *Buckley v. Valeo, supra*, writing

> "Those [classic time place or manner] cases stand for the proposition that the government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication." *Id.* at p. 18.

[131]The Court thoroughly analyzed the various bases of the decision, but also painstakingly compared all the relevant facts and criteria in *Lehman* with those in the instant case, finding the latter a more compelling case for the limited, but "content-based" restriction it upheld. (JA 460-464)

[132]The plurality opinion was written by Justice Blackmun, and joined in by Justices White, Rehnquist and The Chief Justice. It held that because the city transit system was "engaged in commerce" and was not a public forum, its choice concerning what kind of speech to permit on its car cards need only avoid being "arbitrary capricious or invidious." *Id.* at pp. 302-304.

concurring[133] opinions in *Lehman v. City of Shaker Heights, supra.* Although acknowledging that *Lehman* was "a close case"[134] the District Court held that

> "content restrictions...need not always be justified by state interests that are compelling. *Lehman* shows that if there is no public forum, then reasonable governmental restrictions on speech may be sustained providing they are not arbitrary, capricious or invidious."

The District Court's holding, insofar as it depended on a determination of "no public forum" need not rely entirely on the plurality opinion in *Lehman.* There is substantial additional support for the notion that the farther one moves from a traditional, open, public forum, the more reasonable and permissible it is for the govern-

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[133]Justice Douglas' concurring opinion was based on the primacy of the competing First Amendment interests of the street car's "captive audience" to be free from unwanted, offensive messages. See Point I (B), *supra* at pp. 31-34. The New York Court of Appeals also found this an important "interest" within the reasonable time, place or manner analysis (10a).

[134]The utilities have attempted to distinguish *Lehman* on the grounds, *inter alia*, that it did not involve *denying* a private property owner the right to do what s/he wished with her/his property. This argument is unavailing for two reasons. First, a substantial majority of this Court has strongly suggested that private ownership of the prohibited *means* of communication is irrelevant if the three-pronged "time place or manner" test is otherwise met, *e.g., Linmark Associates, Inc. v. Willingboro, supra*, and see, fn. 123, *supra.* Second, the billing mechanism, financed entirely by ratepayors, is hardly its "private property" in any accepted sense. *Cf., First National Bank of Boston v. Bellotti, supra*, where the means of political speech upheld was financed entirely by shareholders (as in Account 426.4, see, fn. 58, *supra*) rather than by the ratepayors, as here.

ment to regulate classes of speech.[135] Indeed, it is a combination of non-public fora,[136] captive audience,[137] and class-based,[138] viewpoint-neutral regulation which provides a coherent analysis that encompasses all of this Court's decisions, as well as the instant case.

An analysis which takes these three factors into consideration in the context of reasonable "time, place or manner" restrictions is, again, involved in the con-

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[135]See, *e.g.*, Tribe, *supra* at pp. 688-693; Stone, *Fora Americana: Speech in Public Places*, 1974 S. Ct. Rev. 233, 251-52. This analysis would create a spectrum with, at one end, public facilities created for the primary purpose of public communication ("public forums") somewhere in the middle, public facilities (like schools and libraries) created for purposes linked to expression ("semi-public forums") and, at the far end, "government institutions doing the people's business but not performing speech-related functions at all" (these would include jails, military bases and the like). At this far end, the government may exclude classes of peaceable speech which interfere in any way with the function of the government institution so long as the government observes a viewpoint-neutral stance in defining the content determined "class" of speech excluded.

[136]Content-based restrictions are, of course, permissible in privately owned, but public-looking fora such as shopping centers. *E.g., Hudgens v. NLRB, supra; Lloyd Corp. v. Tanner, supra.* The publicly-financed billing mechanism in the instant case falls, conceptually, somewhere between government/commercial and private.

[137]This Court wrote, after *Lehman*, that the State could validly regulate class-based (and therefore not content-neutral) non-obscene speech which was "sexually oriented" where "unconsenting adults" were involved. *Young v. American Mini-Theatres, Inc., supra* at pp. 69-70, at n. 33 (Opinion of the Court, per Stevens, J.).

[138]By "classes" of speech we mean such broad, but viewpoint-neutral distinctions based on content as political/non-political, *e.g., Greer v. Spock*, 424 US 828 (1976); partisan/nonpartisan, *United States Civil Service Commission v. National Association of Letter Carriers*, 413 US 548 (1973); or controversial/non-controversial, *Red Lion Broadcasting Co. v. FCC, supra.* This was essentially the position taken by the New York Court of Appeals in finding that the ban was "not content oriented" (11a).

stitutionally compelled weighing, or balancing of governmental and First Amendment interests.

Where the "place" where speech is regulated is one which need not have been opened in the first instance,[139] regulation by broad classes of content is permissible[140] so long as that regulation is "reasonable" and the state does not favor one viewpoint within the permitted or excluded class.[141] There is more speech, more opportunity for robust debate, and more opportunity for an informed citizenry than there might have been otherwise — and

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[139]For example, the army base in *Greer v. Spock, supra*, could have been closed to virtually all public speech. The choice to open it to all but *political* speech thus increases the total amount of debate, although adding nothing to discussion of candidates or the like. The First Amendment is thus furthered, rather than impaired, so long as the government doesn't take sides. This is a way of understanding *Lehman* as well; the city's uncompelled choice to open its system in a non-discriminatory fashion to commercial advertising increased in absolute terms the amount of information available in the commercial marketplace.

[140]This assumes, as in general "time place or manner" restrictions, that sufficient alternative channels remain for dissemination of the restricted speech. It is this portion of the test which primarily insures that "robust debate" required by the First Amendment.

[141]In discussing all the cases which have involved content-related distinctions, Stone distinguishes between narrowly defined subject matter restrictions (*e.g., Police Dept. of Chicago v. Mosley, supra*, disfavoring all but labor speech), and subject matter restrictions directed against broad classes of speech, cutting across a wide spectrum of issues. The latter including, *e.g., Columbia Broadcasting System v. Democratic National Committee, supra* and *Lehman, supra* (disfavoring all non-commercial public issue speech) and *Buckley v. Valeo, supra; Greer v. Spock, supra; Broadrick v. Oklahoma*, 413 US 601 (1973); and *United States Civil Service Commission v. National Association of Letter Carriers, supra* (disfavoring all partisan political speech) are infinitely less offensive to the First Amendment because of the far smaller chance of the government influencing one side of the debate by a viewpoint-differential effect. Stone, *supra* at pp. 112-114. See New York Court of Appeals opinion at 11a.

at the same time, whatever important state interests are advanced may also be satisfied.[142]

In the instant case, no speech is absolutely prohibited, there are clearly substantial and important state interests, there are numerous and effective [143] channels of communication left open to LILCO, and the means restricted is not a traditional public forum.[144] To the extent that the restriction is related to content, it is not related either to favoring or disfavoring a specific viewpoint, nor is it aimed at a particular action which persons who receive a specific message are likely to take. See, *e.g., Linmark Associates, supra* and fn. 113, *supra*. There is, in fact, little or no danger to First Amendment interests, and little or no possibility for arbitrary or capricious singling out of particular viewpoints.[145] Accordingly the bill insert ban can analytically as well as precedentially be justified as a reasonable restriction on the "time, place or manner" of speech.

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[142]Consider, for example, the state's interest in the aesthetic preservation of its environment *and* the concomitant economic interest in promotion of tourism which is weighed against a minimal intrusion on commercial speech involved in size and place regulation of billboards on public highways. *John Donnelly & Sons v. Mallar, supra; Washington v. Lotze, supra.*

[143]Under general "time place or manner" cases, it is irrelevant that a speaker may be deprived of what may be the *most* effective means of communication, so long as s/he is left with sufficient adequate means. *E.g., Kovacs v. Cooper, supra.* The record in the *LILCO* case showed that the means remaining to LILCO were as, if not more, effective than the restricted bill inserts.

[144]See Point I (E), *supra* at pp. 38-39.

[145]This is unlike, *e.g., Police Dept. of Chicago v. Mosley, supra*, which was actually a decision premised on the Equal Protection Clause, and not directly on the First Amendment.

POINT IV

THE COMMISSION'S PROSCRIPTION ON BILL INSERTS INVOLVING "CONTROVERSIAL MATTERS OF PUBLIC POLICY" IS NOT UNCONSTITUTIONALLY VAGUE

The utilities argue that the Commission's bill insert ban is unconstitutionally vague because

a) it fails to give adequate notice; and

b) it will deter utilities from engaging in protected communication; and

c) it vests overbroad discretion in public officials to regulate discourse.

(Brief of Con Ed, pp. 26-27; Amicus Brief of LILCO, pp. 37-39.)

Extant, relevant case law, the facts and record below, and common sense[146] give short shrift to these claims, as did the New York Court of Appeals[147] and the District Court.

First, the phrase "controversial matters of public policy" is well known, and almost identical to the phrase "controversial issues of public interest" employed in the Federal Communications Commission's fairness doctrine.[148] The latter has been upheld against a similar

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[146]The application of "common sense" is, of course, a most relevant consideration in the determination of vagueness claims. See, *e.g., Connally v. General Construction Company*, 269 US 385-391 (1926).

[147]The New York Court of Appeals, in upholding the bill insert ban, did not even deem it necessary to directly address the vagueness issue, although it was vigorously raised by the utilities there and in the lower State Courts.

[148]In *Connally*, the Supreme Court recognized that "well-known phrases" should not be held unconstitutionally vague. *Connally v. General Construction Co., supra* at pp. 391-92. It should be noted that the term is also quite similar to that used on the subsidy prohibition in *Abood, supra*, which apparently gave this Court no trouble.

claim of vagueness, *Red Lion Broadcasting Co. v. FCC*, 395 US 367, 395-96 (1969), with this Court noting that many years of usage and adjudication exist to provide appropriate guidance to persons whose actions may fall within the ban. Significantly, the Commission itself made reference to the FCC standard,[149] thus allowing utilities to examine a plethora of opinions which interpret the phrase.

Nor, in applying the term "controversial matters of public policy," is the Commission writing on a clean slate. It has determined to employ the term synonymously with "political" advertising[150] as it has used the latter term in classifying advertising expenses which must be included in Account 426.4.[151] That account has been the subject of numerous state judicial and regulatory decisions concerning the meaning of "political" advertising; the existence of such long-standing agency interpretation saves the ban from the utilities' claim[152] of unconstitutional vagueness. See, *e.g., United States Civil Service Commission v. National Association of Letter Carriers, supra* at p. 575.

As if all this were not enough, the Commission has stated its willingness to provide expeditious opinions in any particular bill inserts about which the utilities may be uncertain, *Reconsideration* (64a), the existence

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[149]See, *Reconsideration* (66a).

[150]In its decision in *Natural Resources Defense Council v. Consolidated Edison Co.*, Case 27036 (February 17, 1977), the Commission stated that "we have decided to prohibit utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power."

[151]See fn. 58, *supra*.

[152]This claim is also somewhat disingenuous, since LILCO has agreed to abide by and cooperate with the Commission's cost allocation guidelines for Account 426.4. If it knows what to include as "political advertising" for accounting purposes, it also clearly knows what to *exclude* from bill inserts pursuant to the Commission's ban.

of such a procedure not only gives the utility adequate notice *before* it violates the bill insert ban,[153] it also independently saves the ban from a vagueness challenge. *United States Civil Service Commission v. National Association of Letter Carriers, supra* at pp. 579-80.

POINT V

IF THE COMMISSION'S BAN IS STRUCK DOWN, THIS COURT MUST ORDER THE COMMISSION TO IMPOSE A SHARED ACCESS OR "EQUAL TIME" SCHEME IN ORDER TO SATISFY THE FIRST AMENDMENT AND/OR THE STATE NON-DISCRIMINATION STATUTE.

Amici NRDC, *et al.* have argued from the outset of this proceeding in the Commission, that if a utility is permitted to use the ratepayor-financed bill insert mechanism to express its view on controversial matters, that mechanism will be transferred into a "public forum" or quasi-public forum[154] which in turn will constitutionally require a right of access for opposing viewpoints.

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[153]The record in the *LILCO* case showed that it has never employed the bill inserts either to respond to particular events, or to anticipate them (JA 351-358). This fact, coupled with the relative infrequency with which the inserts were mailed, seriously undercuts the dangers in the "deterrence" argument.

[154]The constitutional right of access to forums controlled by private entities performing quasi-governmental functions has been well established. *Marsh v. Alabama*, 326 US 501 (1946) (company town); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968) (bus terminals); *Tinker v. Des Moines Community School District*, 393 US 503 (1969) (school grounds and building); *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972) (national park grounds); *Albany Welfare Rights Organization v. Wyman*, 493 F.2d 1319 (2d Cir. 1974), *cert. denied* 419 US 838 (1974) (waiting room of county welfare office). The First Amendment protects not

(Footnote continued on next page)

Once the state permits the use of a means or channel of communication within its control[155] for the dissemination of a particular viewpoint[156] it must, consistent with the First Amendment and Equal Protection, open that

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only access to *places* where free speech rights are exercised, like streets and parks, it also protects access to *channels* of communication supervised in whole or in part by the government such as the student newspaper of the public school or university. See, *e.g., Lee v. Board of Regents of State College*, 441 F.2d 1257 (7th Cir. 1971); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (high school newspaper which has carried articles and letters on the Vietnam War and the draft is a forum for the dissemination of ideas, and cannot refuse to carry a paid advertisement opposing the war). Another such channel was found in the *Texas Bar Journal*, the official publication of the Texas state bar (a state agency), *Kadical Lawyers Caucus v. Pool*, 324 F. Supp. 268 (W.D. Tex. 1970). See also, *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 56, 434 P.2d 982, 985, 64 Cal. Rptr. 430, 433 (*en banc*)(1967); *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967); *Hillside Community Church, Inc. v. City of Tacoma*, 76 Wash. 2d 63, 455 P.2d 350 (Sup. Ct. of Wash. 1969) (*en banc*), and *Red Lion Broadcasting Co. v. FCC, supra.*

[155]It is this official permission, given by the state agency charged with regulating a state created monopoly in the performance of its public interest mandated, ratepayor financed activity, which transforms LILCO's use of bill inserts to state action and which distinguishes the instant case from the narrower holding in *Jackson v. Metropolitan Edison Co., supra* (state did not authorize turnoffs, so no state action). See *Denver Welfare Rights Organization v. PUC*, 547 P.2d 239, 244 (S. Ct. Colo. 1976) (*en banc*) (distinguishing *Jackson*). See also Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 S. Ct. Rev. 221.

[156]It is the difference between proscribed classes of *speech*, and particular *viewpoints* within those classes, which distinguishes this from *Lehman, supra.* That is to say, Shaker Heights could bar political advertising altogether, but once it allowed car cards for Republicans, it would be required, as a First Amendment matter, to sell to Democrats as well.

channel to all opposing viewpoints as well. See, *e.g., Police Dept. of Chicago v. Mosley, supra.*[157]

To permit a utility to disseminate pro-nuclear views would place the state in a position of "favoring" such views over those quite different positions taken by Amici and other environmental and consumer groups. To avoid this problem, the Commission has imposed the ban challenged here, and has done so seeing that ban as less restrictive than the Amici's shared access proposals.[158]

If this Court strikes down the ban, and permits utilities to use bill inserts for the dissemination of their own views, it must order the Commission to enact a shared access scheme consistent with the First Amendment and the Equal Protection clause.

The issue of shared access is both ripe for this Court's consideration, and indeed, constitutionally compelled if the ban is struck down.[159] The Commission clearly has, as it has asserted,[160] the *power* to impose

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[157]In *Mosley*, the state could, presumably, have banned *all* picketing during school hours; to permit labor picketing (which is, almost inevitably, pro-union) was to unreasonably and unconstitutionally *favor* not only a class of speech, but a particular viewpoint over all others.

[158]See discussion of the "least restrictive means" argument at Point I (E), *supra* at pp. 38-39.

[159]See discussion above and at fn. 118, *supra.*

[160]None of the Commission's opinions dealing with the access issue express any doubt about power, but rather about the comparative wisdom, in First Amendment and administrative terms, of employing that power.

and administer an access scheme;[161] if this Court rejects the Commission's ban, it must remand with directions for the Commission to exercise that power.

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[161]This power derives both from the First Amendment and from the New York Public Service Law, particularly those non-discrimination provisions discussed *supra*. The access scheme which the First Amendment would require here would not be prohibited by this Court's decision in *Tornillo, supra*, since that case was very clearly confined to the print press. Compare, *e.g., Red Lion, supra* (scarcity of regulated resource permits access requirements). Further, even if the bill insert mechanism were deemed entirely the "private property" of a utility (which it is not) and the First Amendment rights of the utility were perceived in some way to outweigh those of Amici and all dissenting ratepayors (which they do not), the state still has a compelling *statutory* interest sufficient to require a utility to open up its "private property" to the view of dissenting ratepayors. See *Hudgens v. NLRB, supra* (no First Amendment right in picketers, but NLRB may, pursuant to statute, require their admission). The New York Court of Appeals affirmed this statutory authority, and this Court is bound by that definitive interpretation of state law.

CONCLUSION

For all of the reasons discussed above, the Commission's ban should be upheld and the opinion of the New York Court of Appeals affirmed; or in the alternative, the case should be remanded with instructions to the Commission to impose and administer a scheme of shared access to the bill insert mechanism.

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